**KETUA PENGARAH BURUH**

**v.**

**BRITANIA BRANDS (MALAYSIA) SDN BHD**

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
HISHAMUDDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: J-01-145-2008]
16 MAY 2010

***ADMINISTRATIVE LAW:*** *Judicial Review - Certiorari - Right to legal representation - Rules of natural justice - Whether the respondent has the common law right to appear and be heard through counsel at the hearing of the inquiry - Whether the appellant had wrongly exercised its discretion in refusing to grant an adjournment and in doing so had also restricted the respondent's common law right - Whether respondent was legally entitled to obtain the services of a lawyer*

***LABOUR LAW:*** *Judicial Review - Certiorari - Right to legal representation - Labour officer refused to allow adjournment in order to allow the respondent to engage counsel - Labour officer's order dated 15 November 2002 directed respondent to pay interest retrospectively - Whether the order contravened s. 69(3A) of the Employment Act 1955 - Employment Act 1955, s. 69(3A) does not confer inherent jurisdiction on labour officer to impose interest retrospectively - Nullity*

The respondent was the employer of Madam Tan Tik Sing ("TTS"). The common practice adopted and implemented by the respondent was to retire all its employees at the age of 55 years. By a letter dated 25 March 2002, the respondent informed TTS that she will be attaining the retirement age of 55 years on 28 May 2002 and on that date she would be retiring. TTS worked until 28 May 2002 and on that date she retired. TTS filed a claim against the respondent seeking termination benefits in the sum of RM32,959.40 at the labour office by virtue of s. 69 of the Employment Act 1955. The summons stated that the respondent was summoned to attend at the labour office in Johor Bahru on 28 August 2002 to answer the complaint lodged by TTS. On 28 August 2002, Liew Ah Fatt, the respondent's assistant human resources manager attended the

meeting at the office of the director-general in Johor Bahru. The meeting was presided by Encik Anuar, a labour officer who advised that it would be best to settle the issue or wait for the next forthcoming meeting to be called by the officer in charge, Encik Yusoff bin Harun. On 12 November 2002, Liew Ah Fatt attended the hearing and TTS was also present. Encik Yusoff bin Harun asked parties whether there was any settlement reached. On being told there was no settlement, he informed the parties that he would proceed to hear the case. Liew Ah Fatt informed Encik Yusoff bin Harun that the respondent preferred legal representation and requested for a short adjournment. Encik Yusoff bin Harun responded that he would commence the hearing irrespective of whether the respondent's solicitor was present or not. At the conclusion of the trial, Encik Yusoff bin Harun allowed TTS's claim. The respondent later received the order dated 15 November 2002 ordering it to pay RM32,959.40 to TTS as termination benefits and that if there was late payment, interest of 8% per year will be imposed with effect from 14 October 2002 until full settlement. The respondent applied for an order of *certiorari* to quash the appellant's decision. The learned Judicial Commissioner ("JC") allowed the respondent's application and also ordered the matter to be remitted back to the labour court to be re-heard by a different labour officer. The appellant then appealed to this court.

**Held (dismissing the appeal and affirming the decision of the High Court)**

**Per Abdul Malik Ishak JCA delivering the judgment of the court:**

**(1)** In order to defend the claim, the respondent was required to prove that there was in existence an implied retirement age in the respondent's company by regular custom and practice. There was also a point of law as to whether under reg. 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 and s. 2 of the Employment Act 1955, a retirement age could be construed by way of an implied term. All these are serious issues of facts and law that no lay person could possibly handle without the assistance of legal representation. (para 46)

**(2)** The labour officer breached the rules of natural justice or procedural fairness when he conducted the inquiry on 12 November 2002 by refusing to allow an adjournment for the respondent to secure legal representation. Such a refusal

curtailed the respondent's common law right of legal representation. Section 70 of the Employment Act 1955 does not restrict the right to counsel accorded to either party during the hearing of the inquiry. Although it would seem unfair to TTS if the respondent was given the adjournment in order to seek legal representation because TTS was unrepresented by counsel and she was all alone to claim for her termination benefits, nevertheless, the respondent was legally entitled to obtain the services of a lawyer and the Employment Act 1955 does not restrict the respondent's common law right to legal representation. (paras 55, 61, 70, 71 & 72)

**(3)** The order dated 15 November 2002 directing the respondent to pay interest retrospectively with effect from 14 October 2002, runs counter to s. 69(3A) of the Employment Act 1955. Section 69(3A) does not confer an inherent jurisdiction on the labour officer to impose interest retrospectively and it is a nullity to do so. Accordingly the appeal is dismissed. (paras 79, 80 & 81)

***Bahasa Malaysia*** *Translation Of Headnotes*

Responden adalah majikan Madam Tan Tik Sing ('TTS'). Amalan biasa yang diterimapakai dan dijalankan oleh responden adalah untuk semua pekerja-pekerjanya bersara pada umur 55 tahun. Melalui surat bertarikh 25 Mac 2002, responden telah memberitahu TTS bahawa beliau akan mencapai umur persaraan 55 tahun pada 28 Mei 2002 dan beliau akan bersara pada tarikh tersebut. TTS bekerja sehingga 28 Mei 2002 dan pada hari itu beliau pun bersara. TTS memfailkan tuntutan terhadap responden mendapatkan faedah-faedah penamatan RM32,959.40 di pejabat buruh berdasarkan s. 69 Akta Kerja 1955. Saman telah menyatakan responden dipanggil menghadirkan diri di pejabat buruh di Johor Bahru pada 28 Ogos 2002 untuk menjawab aduan yang dibuat oleh TTS. Pada 28 Ogos 2002, Liew Ah Fatt, pembantu pengurus sumber manusia telah menghadirkan diri di mesyuarat yang diadakan di pejabat Ketua Pengarah di Johor Bahru. Mesyuarat dipengerusi oleh Encik Annuar, seorang pegawai buruh yang menasihatkan supaya menyelesaikan isu atau tunggu sehingga mesyuarat dipanggil oleh pegawai yang bertanggungjawab, Encik Yusoff Harun. Pada 12 November 2002, Liew Ah Fatt menghadirkan diri di perbicaraan dan TTS juga hadir. Apabila diberitahu bahawa tiada penyelesaian

dicapai, Encik Yusoff Harun memberitahu pihak-pihak terlibat bahawa beliau akan terus mendengar kes ini. Liew Ah Fatt memberitahu Encik Yusoff Harun bahawa responden inginkan perwakilan di sisi undang-undang dan telah memohon penangguhan. Encik Yusoff Harun menjawab bahawa beliau akan memulakan perbicaraan sama ada peguam responden hadir atau tidak hadir. Di akhir perbicaraan, Encik Yusoff Harun telah membenarkan permohonan TTS. Responden kemudiannya menerima perintah bertarikh 15 November 2003 memerintahnya membayar RM32,959.40 kepada TTS sebagai faedah-faedah penamatan dan jikalau terdapat bayaran lewat, faedah 8% setahun akan dikenakan dengan efek dari 14 Oktober 2002 sehingga penyelesaian penuh. Responden memohon perintah *certiorari* untuk membatalkan keputusan perayu. Pesuruhjaya Kehakiman ('PK') membenarkan permohonan responden dan membuat perintah bahawa halperkara ini diremit balik ke mahkamah perusahaan untuk dibicarakan sekali lagi oleh pegawai buruh yang lain. Oleh itu perayu membuat rayuan ke mahkamah ini.

**Diputuskan (menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi)**

**Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:**

**(1)** Untuk mempertahankan dakwaan, responden perlu membuktikan bahawa terdapat kewujudan umur persaraan yang tersirat di dalam syarikat responden oleh adat dan amalan yang biasa. Terdapat juga persoalan undang-undang sama ada di bawah reg. 4 Peraturan Pekerjaan (Pampasan Penamatan dan Pemberhentian Kerja) dan s. 2 Akta Kerja 1955, umur persaraan boleh ditafsirkan melalui terma tersirat. Semua ini adalah isu-isu yang serius yang orang-orang awam tidak dapat mengendalikan tanpa bantuan perwakilan di sisi undang-undang.

**(2)** Pegawai buruh telah melanggar kaedah-kaedah keadilan asasi atau prosedur keadilan apabila mengendalikan siasatan pada 12 November 2002 kerana tidak membenarkan penangguhan supaya responden boleh mendapatkan perwakilan di sisi undang-undang. Penolakan seperti itu membataskan hak undang-undang lazim perwakilan di sisi undang-undang. Seksyen 70 Akta Kerja 1955 tidak menghadkan hak untuk mendapatkan peguam yang

diberikan kepada pihak-pihak semasa perbicaraan siasatan. Walaupun ia tidak adil kepada TTS jikalau responden diberi perintah penangguhan untuk mendapatkan perwakilan di sisi undang-undang kerana TTS tidak diwakili oleh peguam dan beliau seorang sahaja yang memohon faedah-faedah penamatan, namun begitu, responden mempunyai hak dari segi undang-undang untuk memperolehi perkhidmatan seorang peguam dan Akta Kerja 1955 tidak menghadkan hak undang-undang lazim ke atas perwakilan di sisi undang-undang.

**(3)** Perintah bertarikh 15 November 2002 yang memerintahkan responden membayar faedah secara retrospektif dengan efek dari 14 Oktober 2002, seiringan dengan s. 69(3A) Akta Kerja 1955. Seksyen 69(3A) tidak memberi bidangkuasa semulajadi ke atas pegawai buruh untuk mengenakan faedah secara retrospektif dan ia adalah tidak sah untuk berbuat demikian. Oleh itu rayuan ini adalah ditolak.

**Case(s) referred to:**

*Abdul Raub v. The Attorney-General [1982] 1 LNS 68 CA* ***(refd)***

*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145* ***(refd)***

*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 6 CLJ 473 CA* ***(refd)***

*Armitage v. Parsons [1908] 2 KB 410* ***(refd)***

*Austral Amalgamated Tin Bhd v. Abdul Wahab Kopon & Ors & Anor Appeal [2004] 2 CLJ 316 CA* ***(refd)***

*Badat Drani v. Tan Kheat [1953] 1 LNS 6 HC* ***(refd)***

*Behn Meyer & Co (M) Sdn Bhd v. Agropharm Sdn Bhd & Ors (Eskos Printing House Sdn Bhd & Ors, Garnishees) [1986] 1 LNS 125 HC* ***(refd)***

*Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155* ***(refd)***

*Deputy Chief Police Officer Of Perak & Anor v. Ramesh Thangaraju [2001] 1 CLJ 245 CA* ***(refd)***

*Doresamy v. Public Services Commission [1971] 1 LNS 28 HC* ***(refd)***

*Dr Groenvelt v. Dr Burwell Et Al', Censors of the College of Physicians [1866] 91 English Reports, 1 Ld Raym 454* ***(refd)***

*Dunlop Industries Employees Union v. Dunlop (M) Industries Bhd [1987] 1 CLJ 232; [1987] CLJ (Rep) 86 SC* ***(refd)***

*Enderby Town Football Club Ltd v. The Football Association Ltd And Another [1971] 1 All ER 215 CA* ***(refd)***

*Esso Production Malaysia Inc v. Aladdin Mohd Hashim [2000] 3 CLJ 334 CA* ***(refd)***

*Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC* ***(refd)***

*Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC* ***(refd)***

*Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC* ***(refd)***

*Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC* ***(refd)***

*Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal For Ulu Kinta & Ors [1971] 1 LNS 39 FC* ***(refd)***

*Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 FC* ***(refd)***

*Melayu Raya Press Ltd v. WL Blythe The Colonial Secretary [1951] 1 LNS 51 HC* ***(refd)***

*National Union Of Newspaper Workers v. Nanyang Press (Malaya) Sdn Bhd [1993] 1 LNS 42 HC* ***(refd)***

*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC* ***(refd)***

*Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC* ***(refd)***

*R v. Secretary of State for the Home Department and others, ex parte Tarrant and another, R v. Wormwood Scrubs Prison Board of Visitors, ex parte Anderson and others [1984] 1 All ER 799* ***(refd)***

*Re An Application By Marly Laboratory, Ltd [1952] 1 All ER 1057* ***(refd)***

*Regina v. Board of Visitors of HM Prison, The Maze, Ex parte Hone, Regina v. Board of Visitors of HM Prison, The Maze, Ex parte McCartan [1988] 1 AC 379* ***(refd)***

*Selverajan v. Race Relations Board [1976] 1 All ER 12 CA* ***(refd)***

*Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA* ***(refd)***

*Soonfroze Corporation Sdn Bhd v. Siti Salabiah Chek Hassan & Ors [2003] 6 CLJ 97 HC* ***(refd)***

*Tan Yook Tian & Anor v. The District Forest Officer, Rompin, Pahang & Ors [1987] 1 CLJ 73; [1987] CLJ (Rep) 1018 HC* ***(refd)***

*Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA* ***(refd)***

**Legislation referred to:**

Employment Act 1955, ss. 2, 69(3A), 70(c), (d), (g), (h)

Employment (Termination and Lay-Off Benefits) Regulations 1980, reg. 4

Rules of the High Court 1980, O. 20 r. 11, O. 53 r. 1

*For the appellant - Datin Azizah Hj Nawawi SFC; AGs' Chambers* A
*For the respondent - Raymond TC Low; M/s Shearn Delamore & Co*

*[Appeal from High Court, Johor Bahru; Application For Judicial Review No: MT4-25-8-2003]*

*Reported by Susheila Sreedharan* B

## JUDGMENT

**Abdul Malik Ishak JCA:** C

### Introduction

**[1]** This was an appeal by the appellant (Ketua Pengarah Buruh Malaysia) against the decision of the learned Judicial Commissioner ("JC") who allowed the respondent's (Britania Brands (Malaysia) Sdn Bhd's) application for an order of *certiorari* to quash the decision of the appellant *vide* case no: 646/2002. The learned JC also ordered that the matter be remitted back to the Labour Court to be re-heard by a different Labour Officer. D E

### Facts Of The Case

**[2]** The respondent was the employer of Madam Tan Tik Sing ("TTS"). TTS commenced employment with the respondent on 21 October 1963 as a general worker. There was no letter of employment between TTS and the respondent. TTS was engaged through an oral contract and she was a unionised employee at that material time. F

**[3]** In 1985, TTS was promoted to the position of an assistant supervisor and with this promotion she ceased to be a unionised employee. G

**[4]** The common practice adopted and implemented by the respondent was to retire all its employees, whether unionised or otherwise, at the age of 55 years. By way of a letter dated 25 March 2002, the respondent informed TTS that she will be attaining the retirement age of 55 years on 28 May 2002 and on that date she would be retiring. TTS worked until 28 May 2002 and on that date she retired. H I

**[5]** TTS filed a claim against the respondent seeking termination benefits in the sum of RM32,959.40 at the labour office by virtue of s. 69 of the Employment Act 1955. This was on 13 August 2002 and the case was registered as the Director-General of Labour summons case no: 646/2002. The summons stated that the respondent was summoned to attend at the labour office in Johor Bahru on 28 August 2002 to answer the complaint lodged by TTS.

**[6]** The respondent received the summons dated 13 August 2002 under s. 70(c) of the Employment Act 1955 issued by the appellant.

**[7]** Choong Ah Fatt @ Liew Ah Fatt - the respondent's assistant human resources manager (hereinafter referred to as "Liew Ah Fatt"), deposed in his affidavit that it was the practice of the labour department to conduct such summons cases as meetings for purposes of promoting amicable settlement of labour disputes.

**[8]** On 28 August 2002, Liew Ah Fatt attended the meeting at the office of the director-general in Johor Bahru. The meeting was presided by a labour officer by the name of Encik Anuar and he conducted the meeting by reading out TTS's claim against the respondent and thereafter he invited both the parties to settle the matter amicably. Encik Anuar advised that it would be best to settle the issue or wait for the next forthcoming meeting to be called by the officer in charge in the person of Encik Yusoff bin Harun.

**[9]** Liew Ah Fatt informed the labour officer that the respondent was keen to settle the matter amicably. On that day, the conciliatory process could not be completed and it was adjourned to another date to be fixed by the labour office.

**[10]** The respondent then received a letter dated 2 September 2002 from the assistant director-general of labour signed by Encik Yusoff bin Harun, relaying the message that the matter was fixed for further "perbicaraan" on 3 October 2002. And on that date, Liew Ah Fatt went to the labour office in Johor Bahru to attend the scheduled "perbicaraan". An officer in the labour office informed him that the person in charge by the name of Encik Yusoff bin Harun was not available on that date because he had gone to attend a course. Unfortunately, no prior notification of the adjournment was issued to the parties.

**[11]** By letter dated 15 October 2002 signed by Encik Yusoff bin Harun, the respondent was informed that the matter was fixed for further "perbicaraan" on 6 November 2002. But that date turned out to be a public holiday, and the "perbicaraan" was adjourned once again.

**[12]** Again, by letter dated 28 October 2002 signed by Encik Yusoff bin Harun, the matter was fixed for further "perbicaraan" on 12 November 2002.

**[13]** On 26 October 2002, it was reported in three local Chinese newspapers that TTS had lodged a complaint with the MCA's (Malaysian Chinese Association's) representative that the respondent had failed to pay her retirement benefits on her retirement. Again, on 17 November 2002, a report in the local Chinese newspaper featured TTS together with the Minister of Human Resources and the Member of Parliament for Tambatan. The Minister was reported to have said that he would assist TTS to recover her welfare benefits and that he agreed to look into the matter and settle it accordingly. The report also carried the photograph of the Minister shaking hands with TTS in the presence of the MCA's representative.

**[14]** Liew Ah Fatt attended the hearing on 12 November 2002. TTS was also present. Both the parties were called by Encik Yusoff bin Harun into his room and they were asked whether there was any settlement reached. Liew Ah Fatt informed Encik Yusoff bin Harun that so far there was no settlement but the respondent was open to further conciliatory negotiations. Encik Yusoff bin Harun then informed the parties that if there were no settlement, he would proceed to hear the case. He then instructed both the parties to wait outside.

**[15]** Liew Ah Fatt informed Encik Yusoff bin Harun that the respondent preferred to be represented by an advocate and solicitor and requested for a short adjournment. Encik Yusoff bin Harun responded and said that he would commence the hearing irrespective of whether the respondent's solicitor was present or not.

**[16]** Encik Yusoff bin Harun then proceeded with the hearing on the same day. TTS was examined under oath. And it was submitted that Liew Ah Fatt, who was not legally trained, could not conduct the cross-examination in an effective way. Encik Yusoff bin Harun then directed Liew Ah Fatt to give his evidence in the witness box.

**[17]** At the conclusion of the trial, Encik Yusoff bin Harun orally allowed TTS's claim. On 18 November 2002, the respondent received a letter dated 14 November 2002 enclosing the appellant's order dated 15 November 2002 in Form 'C'. Briefly, the order stated that the Director-General had on 12 November 2002 heard and decided that the respondent be ordered to pay RM32,959.40 to TTS as termination benefits. The order also stipulated that if there was a late payment, an interest of 8% per year be imposed with effect from 14 October 2002 until full settlement. The order dated 15 November 2002 can be seen at p. 144 of the appeal record and it was worded in this way:

Borang C
Perintah
(Dibawah Seksyen 69 Akta Kerja 1955)

Kes Saman Ketua Pengarah Buruh No: 646/2002

Diantara

Tan Tik Sing — Pengadu

Dan

Britannia Brands (M) Sdn. Bhd. — Defendan

Bahawasanya Pengaduan dalam Kes No. 646/2002 di atas telah didengar dan diputuskan di Jabatan Buruh Johor Bahru pada 12 November 2002. Ketua Pengarah dengan ini membuat perintah yang berikut, bahawa:

Saya, Yusoff bin Harun, Penolong Pengarah Buruh, Pejabat Buruh Johor Bahru, Perintah Britannia Brands (M) Sdn. Bhd. membayar kepada Tan Tik Sing No. Kad Pengenalan: 470528-01-5064 melalui Penolong Pengarah Buruh, Pejabat Buruh Johor Bahru wang berjumlah RM32,959.40 sebagai bayaran faedah penamatan kerja.

Dan adalah diperintahkan lagi iaitu sebagai penalty bayaran lewat, faedah atas kadar 8% setahun hendaklah dikenakan ke atas semua bayaran tertunggak dan faedah itu dikira mulai 14 Oktober 2002 sehingga penyelesaian penuh.

Tarikh: 15 November 2002

Sgd. Illegible
Yusoff bin Harun
Ketua Pengarah Buruh.

### *Certiorari*

**[18]** The following principles must be emphasised:

(a) that *certiorari* issues to quash a decision which is *ultra vires* or vitiated by an error of law on the face of the record; and

(b) that *certiorari* looks to the past and it is sought by the procedure of judicial review.

**[19]** *Certiorari* is the best remedy to control administrative authorities and tribunals and in the words of Holt CJ in *Dr Groenvelt v. Dr Burwell Et Al', Censors of the College of Physicians* [1866] 91 English Reports, 1 Ld Raym 454 at 469:

> for it is a consequence of all jurisdictions, to have their proceedings returned here by *certiorari*, to be examined here. There a *certiorari* was awarded, to remove an indictment for felony, where the party convicted was burnt in the hand, but no judgment given, so that he could not have a writ of error. Where any Court is erected by statute, a *certiorari* lies to it; so that if they perform not their duty, the King's Bench will grant a *mandamus*.

**[20]** In Malaysia, *certiorari* features prominently in our courts. It has been invoked to quash the discretionary decisions of Ministers and other administrative authorities (*Tan Yook Tian & Anor v. The District Forest Officer, Rompin, Pahang & Ors* [1987] 1 CLJ 73; [1987] CLJ (Rep) 1018). In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, this court categorically stated that the power of the High Court to issue *certiorari* or prohibition is purely discretionary and that the court refrained from exercising this jurisdiction unless substantial injustice has ensued, or is likely to ensue.

**[21]** In the Malaysian context, the jurisdiction of the High Court to issue *certiorari* is also supervisory. It is not an appellate nor revisional jurisdiction. In exercising the power of *certiorari*, the High Court exercises its original jurisdiction. George Seah FJ in *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155, FC, at p. 371, aptly said:

> In the exercise of its inherent supervisory jurisdiction over inferior tribunals of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be

A observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.

B

**[22]** In *National Union of Newspaper Workers v. Nanyang Press (Malaya) Sdn Bhd* [1993] 1 LNS 42, it was held that *certiorari* is not an appeal but rather a process where the court may inquire as to how the tribunal has arrived at its decision. In *Harpers Trading*
C *(M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417, at p. 421, the Supreme Court speaking through Jemuri Serjan SCJ succinctly said that "it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute '*de novo*' and decide it on
D its merits".

**[23]** Instances where *certiorari* are refused are many. In *Badat Drani v. Tan Kheat* [1953] 1 LNS 6, *certiorari* was refused to quash an order of the Rent Board on the ground, inter alia, that it was open
E to the petitioner to appeal to the High Court against the Rent Board's order. In *Melayu Raya Press Ltd v. WL Blythe The Colonial Secretary* [1951] 1 LNS 51, *certiorari* was refused and the court speaking through Murray-Aynsley CJ at p. 90 held that "where a right of appeal lies that right should be exhausted first except where
F such act was done without jurisdiction". In *Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal For Ulu Kinta & Ors* [1971] 1 LNS 39, FC, an application by the landlord to quash the decision of the Rent Tribunal was refused by the High Court as well as the Federal Court because there was enough evidence to support the
G decision of the tribunal and therefore there was no reason to disturb its decision.

**[24]** However, this appeal is a classic example where *certiorari* was allowed by the High Court.

H **[25]** The new O. 53 r. 1 of the Rules of the High Court 1980 ("RHC") governs application for judicial review. It is worded as follows:

**1 Scope (O. 53 r. 1)**

I

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

**[26]** According to *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697, the new O. 53 of the RHC was introduced to cure the mischief of its precursor which was narrower and more restrictive. It starts by making reference to the enabling provision introduced in para. 1 of the Courts of Judicature Act 1964 where the courts are given the power to issue such orders and grant such reliefs as are appropriate to the particular circumstances of the case.

**[27]** I have reproduced *in extenso* the new O. 53 of the RHC in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473, CA. There, speaking for this court, I had this to say at p. 478 of the report:

> [10] In a nutshell, any application to challenge the decision of the first defendant/respondent, a public authority, can only be commenced by way of a judicial review under the new O 53 of the RHC. Amendments to the former O 53 of the RHC were made by way of a gazette notification *vide* PU(A) 342/ 2000 with effect from 21 September 2000 and the new O 53 of the RHC is rather comprehensive. It governs the public law remedy of judicial review and it replaces the former O 53 of the RHC prerogative remedies of *certiorari*, prohibition and *mandamus*.

**[28]** And at p. 482 of the same case, this was what I said:

> [14] Statutorily, it is clear that under para 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) (Revised 1972) the High Court has the power to issue to any person or authority directions, orders or writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others. Likewise the High Court too has the powers under the Specific Relief Act 1950 (Act 137) to grant reliefs like *mandamus*, declaration and injunction. All these are housed under the new O 53 of the RHC.

**[29]** And finally at p. 499 of the same case, I had this to say:

> [53] All these cases show a common denominator and that would be this. That the Malaysian courts have dutifully applied the principle as enunciated by Lord Diplock in O'Reilly to the effect that where an issue depended exclusively on the existence of a purely public law right, then the matter must be determined in judicial review proceedings and not otherwise.

**[30]** The Federal Court in *Ahmad Jefri Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 while affirming my decision at the Court of Appeal, aptly said through James Foong FCJ at pp. 171 to 172 of the report:

> [60] Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended O. 53 of the RHC, an alternative remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But section 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 of the RHC also provides the High Court with such power (see Lord Diplock's judgment in *O'Reilly v. Mackman* at p. 1127). However, O. 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* and repeated in YAB Dato' Dr Zambry. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v. Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors.* There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v. Mackman.* The circumstances in *YAB Dato' Dr Zambry* is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status

is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 of the RHC.

**[31]** Continuing at pp. 172 to 173 of the report, James Foong FCJ had this to say:

[61] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambry*. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O. 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

**[32]** It must be borne in mind that the remedy of judicial review is concerned with reviewing and is not concerned with the merits of the decision in respect of which the application for judicial review is made. The court is concerned to look at the decision-making process itself. According to Lord Hailsham of St Marylebone LC in *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155, HL, at p. 1160; [1982] 3 All ER 141, HL, at p. 143:

But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no

A part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

**[33]** It is for these reasons, that a decision of an inferior court or public authority may be quashed by an order of *certiorari* where that court or authority acted without jurisdiction, or exceeded its jurisdiction or failed to comply with the rules of natural justice, or where there is an error of law on the face of the record, or where the decision is unreasonable in the *Wednesbury*'s sense.

**[34]** At the end of the day, everything depends on the facts of the case at hand.

## Analysis

**[35]** The learned JC quashed the decision of the appellant based on three main issues, namely:

(a) Whether the respondent has the common law right to appear and be heard through counsel at the hearing of the inquiry?

(b) Whether the appellant had wrongly exercised its discretion in refusing to grant an adjournment and in doing so had also thereby restricted the respondent's common law right?

(c) Whether the order of Encik Yusoff bin Harun dated 15 November 2002 prescribing for the computation of interest to commence on 14 October 2002 contravened s. 69(3A) of the Employment Act 1955?

**[36]** These three issues will now be considered separately.

## The First Issue

**[37]** The learned JC made reference to the case of *Doresamy v. Public Services Commission* [1971] 1 LNS 28 and held that the respondent has the common law right to appear and be heard through counsel at the hearing of the inquiry. But it was argued by the appellant that whole sale importation of the English common law into the Malaysian legal system has not been well received by our Federal Court. In *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573, Zaki Tun Azmi PCA (now Chief Justice) aptly said at p. 585 of the report:

(16) It is quite well established that the courts in Malaysia should be wary in adopting principles of law which is based on the common law of England when there is specific provision in our statute.

**[38]** And after referring to some authorities, Zaki Tun Azmi PCA (now Chief Justice) had this to say, in the same case, at p. 587 of the report:

(21) So from this line of cases, it is clear that the courts should not import common law from other countries where legislation in Malaysia has clearly provided for it.

**[39]** The relevant legislation governing the law pertaining to an inquiry before the labour officer would be the Employment Act 1955. It is this Act that should be referred to. And by virtue of s. 69 of the Employment Act 1955, it was argued by the appellant that there is no right to counsel during the hearing. According to the appellant, the reasons for this line of approach may compendiously be listed as follows:

(i) That the procedure to inquire into a complaint under s. 69 of the Employment Act 1955 is specifically set out in s. 70 of the same Act. Section 70 of the Employment Act 1955 gives the power to the appellant to inquire into the complaint of the complainant. And under para. (d) of s. 70 of the Employment Act 1955 when issuing a summons to a person complained against the appellant shall give such persons notice of the nature of the complaint made against him and the name of the complainant and shall inform him of the date, time and place at which he is required to attend and shall inform him that he may bring with him any witnesses he may wish to call on his behalf and that he may apply to the appellant for summonses to such persons to appear as witnesses on his behalf.

(ii) And paragraph (g) to s. 70 of the Employment Act 1955 provides that the appellant shall, at the time and place appointed, examine on oath or affirmation those persons summoned or otherwise present whose evidence the appellant deems material to the matters in issue and the appellant shall then give its decision on the matters in issue.

(iii) While para. (h) to s. 70 of the Employment Act 1955 states that if the person complained against or any person whose financial interests the appellant has reason to believe are likely to be affected and who has been duly summoned to attend at the time and place appointed in the summons shall fail so to attend the appellant may hear and decide the complaint in the absence of such person notwithstanding that the interests of such person may be prejudicially affected by the decision of the appellant.

**[40]** Flowing from all these, the appellant emphasised that from the clear words of s. 70 of the Employment Act 1955 there is no right to counsel for either party during the inquiry pursuant to s. 69 of the same Act. And since there is no such right to counsel, it was pointed out by the appellant that "there cannot be any breach of duty where none exists in law" (to borrow the words of Siti Norma Yaakob FCJ in *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777, at p. 784f).

**[41]** It follows therefore that since there is nothing in s. 70 of the Employment Act 1955 that entitles the respondent to have access to counsel during the inquiry, the appellant cannot be said to have deprived the respondent of procedural fairness by refusing to allow the adjournment to enable the respondent to secure a counsel to represent them. This constituted the main plank of the submission of the appellant.

**[42]** The Employment Act 1955 is a social legislation and the inquiry before the appellant pursuant to s. 69 of the said Act is only an inquiry between "an employee and his employer in respect of wages or any other payments in cash due to such employee." Here, it was an inquiry in relation to termination benefits amounting to RM32,959.40 due to TTS. And such an inquiry cannot be considered as a court proceeding.

**[43]** There is a passage in the judgment of Abdul Hamid Mohamad JCA (later Chief Justice) in *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, CA, that merits reproduction. There, in the context of the standard of proof for dismissal of an employee before the Industrial Court, his Lordship had this to say at p. 322 of the report:

> From all these, it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law. The Industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience.

**[44]** Likewise here, the inquiry under s. 69 of the Employment Act 1955 "should not be burdened with technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law." Put in another way, it was argued by the appellant that the procedure in an inquiry before a labour officer under s. 69 of the Employment Act 1955 as stipulated in s. 70 of the same Act should not be equated to the procedure adopted in a court proceeding. It was further argued by the appellant that since there is no legal requirement for legal representation before the labour officer, the refusal to grant an adjournment in order to secure the services of counsel cannot be the basis to quash the proceedings before the labour officer. In the words of Nik Hashim JCA (later FCJ) in *Austral Amalgamated Tin Bhd v. Abdul Wahab Kopon & Ors & Anor Appeal* [2004] 2 CLJ 316, at p. 320:

> [10] The inquiry that was conducted by the Senior Labour Officer in the present case is the inquiry by virtue of the power under s. 69 of the EA given to the Director General of Labour to inquire into any dispute between an employee and his employer. It is only an inquiry and not a court proceeding. It is therefore erroneous to classify the Labour Office as an 'inferior court' in the definition of 'subordinate court' under s. 3 of the CJA or a Labour Court as it is normally called, simply because the Labour Office is not a court in the first place. Moreover, there is no provision for a Labour Court in the EA.

**[45]** Since there is no provision for a labour court in the Employment Act 1955, the appellant argued that it is erroneous to submit that "the labour court is a quasi judicial body established under the Employment Act 1955 and is therefore required to observe the rules of natural justice and procedural fairness under administrative law." But the respondent relied on the case of *Esso Production Malaysia Inc v. Aladdin Mohd Hashim* [2000] 3 CLJ 334, CA as a basis to argue that in the inquiry the respondent ought to

have legal representation. That case concerned a charge of bribery and the court held that in such cases the right to legal representation was a *sine quo non* and that the refusal to allow an adjournment in order to enable counsel to be retained would be in breach of the rules of natural justice and procedural fairness. Whereas here, it concerns an inquiry before a labour officer under s. 69 of the Employment Act 1955. Although it is a simple case, it was argued that legal representation is still required.

**[46]** It was further argued by the respondent that the claim instituted by TTS was not a simple and straightforward case as was made out by the appellant. We are of the considered view that in order to defend the claim, the respondent was required to prove that there was in existence an implied retirement age in the respondent's company by regular custom and practice. And there was also a point of law as to whether under reg. 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 and s. 2 of the Employment Act 1955, a retirement age could be construed by way of an implied term. All these, in our judgment, are serious issues of facts and law that no lay persons could possibly handle.

**[47]** We must allude, once again, to the case of *Esso Production Malaysia Inc v. Aladdin Mohd Hashim (supra)*. That was a case where the respondent's solicitor had applied for an adjournment because he was engaged in a criminal case and was unable to attend the hearing before the Industrial Court. The request for adjournment was turned down and the respondent's solicitor withdrew from the case. According to the respondent, he was only made aware of these circumstances some six days before the hearing. And when the matter was called up for hearing, once again, the respondent appeared in person and requested for an adjournment but the Industrial Court refused the adjournment based on an objection being taken by the appellant. The Industrial Court upheld the respondent's dismissal and agreed with the appellant's contention that the charge of bribery had been made out. The respondent then applied for orders of *certiorari* and *mandamus* which were granted by the High Court. The appellant appealed to this court. Gopal Sri Ram JCA (later FCJ) writing for this court, made the following germane observations at p. 340 of the report:

> First, the Industrial Court when holding that the trial had been postponed on a number of occasions failed to take into account the fact that on two of those occasions, the postponements were not at

the behest of the respondent. If one reads the ruling of the learned chairman, one gets the impression that the respondent was responsible for the delay in the proceedings. That was plainly not the case.

The second reason is the nature of the allegations against the respondent. We remind ourselves that the charge is one of bribery. If proved, it demolishes the reputation of the person against whom it is made. In the circumstances, the issue is whether the respondent was given a fair opportunity to redeem his reputation. With respect, we do not think he was. The right to legal representation is a *sine qua non* in a case as the present. The Industrial Court ought to have allowed the respondent to be represented by legal counsel who is trained in the skill of cross-examination.

We are therefore left in serious doubt whether the respondent was able to get his points across during cross-examination. We are therefore unable to say with confidence that a fair procedure was given to the respondent on the facts peculiar to this case.

**[48]** The same principles were applied by VT Singham J in *Soonfroze Corporation Sdn Bhd v. Siti Salabiah Chek Hassan & Ors* [2003] 6 CLJ 97; [2003] 2 AMR 427. That was a case where the company's representative had applied for an adjournment one day prior to the hearing on the ground that his wife had just delivered a baby. The application was refused and the hearing proceeded in his absence. The learned High Court judge held that it was at the discretion of the court whether to allow or to deny an application for the postponement of the case. And the exercise of such a discretion must be made in accordance with sound principles of natural justice so that a miscarriage of justice can be avoided. At p. 441 of the report, his Lordship had this to say:

Nevertheless, it could be argued that a refusal to grant an adjournment may in some cases be tantamount to a denial of a reasonable opportunity being granted to the affected party to present his case. In *Sullivan v. Department of Transport* [1978] 1 ALD 383, his Lordship Smithers J for the Federal Court of Australia - General Division said:

'... a refusal to grant an adjournment can constitute a failure to give a party to proceedings the opportunity of adequately presenting his case'.

**[49]** And at p. 445, his Lordship made the following pertinent observations:

> In the circumstances, this court cannot allow the inquiry which was heard and concluded *ex parte* to be sustained as justice in the Labour Court is not administered just for the employees, but should be equally and evenly applied to the employers as well, especially where the parties in most number of cases are not represented by counsel (see *James v. Minister of Pension* [1947] 2 All ER 432 at 435). An employer is entitled to defend his employees' claim by oral or documentary evidence and every opportunity should be given for rebuttal evidence. This court is mindful that it has been said time and time again by our superior courts that 'Justice delayed is justice denied' but it must also be reminded that 'Justice hurried is also justice denied'. Although the assistant director of labour is clothed with the discretion which he may exercise as to whether to grant the adjournment or not, it is the respectful view of this court that that discretion must be exercised on a case to case basis and after giving due weight to the grounds advanced for the postponement and the material facts before the court.

**[50]** Finally, at pp. 446 to 447, his Lordship aptly said:

> Accordingly, on this ground alone where the postponement was refused by the assistant director of labour, the appeal should be allowed as the employers-corporation has been denied the opportunity of putting forward their case to rebut the employees' claim as well as to rebut the inference as provided in s. 15(2) of the Employees Act 1955. One thing must be made clear, this court will not abrogate its functions by refusing to review the exercise of the discretion of the lower court or tribunal even if the decision to refuse an adjournment was in the exercise of its discretion if the consequences of it has occasioned a miscarriage of justice. Judicial intervention, in the view of this court, becomes necessary when that discretionary justice is exercised with complete disregard to relevant considerations and which, no doubt, will result in an unreasonable exercise of that discretion.

**[51]** Accordingly, we would answer the first issue in the positive.

## The Second Issue

**[52]** Both the first and the second issues are related to one another and they certainly overlap to a large extent.

**[53]** Encik Yusoff bin Harun who conducted the inquiry categorically denied on affidavit that the respondent's representative had made a formal application during the inquiry for an adjournment to enable legal representation to be present and to assist the respondent. In his affidavit in reply affirmed on 27 October 2004 as seen at pp. 78 to 82 of the appeal record, Encik Yusoff bin Harun averred at para. 10 as follows:

> Pemohon telah tidak pada sebarang masa, semasa perbicaraan dijalankan, memaklumkan di dalam Mahkamah Terbuka niatnya untuk melantik peguam bagi mewakilinya di dalam prosiding di Mahkamah Buruh bagi kes ini. Dan pemohon juga tahu bahawa kes telah ditetapkan untuk perbicaraan seperti yang dinyatakan dalam notis perbicaraan dan sebarang lantikan peguam hendaklah dibuat sebelum tarikh perbicaraan. Wakil pemohon juga telah diberi peluang untuk menyoal balas saksi dan memberi keterangan bagi pihak pemohon.

**[54]** However, Encik Yusoff bin Harun in the same affidavit in reply at para. 9 admitted that Liew Ah Fatt did mention to him that he wanted to engage counsel. Encik Yusoff bin Harun told Liew Ah Fatt that he should have appointed his lawyer before the date fixed for hearing. But Encik Yusoff bin Harun admitted that these facts were not recorded in the notes of evidence for the inquiry proceeding. Thus, the complaint that the labour officer failed to allow the adjournment in order to allow the respondent to engage counsel was entirely true.

**[55]** With respect, the learned JC misconstrued para. 9 of Encik Yusoff bin Harun's affidavit in reply. Based on this affidavit in reply, the learned JC accepted that an application for an adjournment was in fact made by Liew Ah Fatt. It is our judgment that Encik Yusoff bin Harun was not entitled to reject the application for an adjournment to enable Liew Ah Fatt to engage counsel. We must emphasise that:

(a) section 70 of the Employment Act 1955 does not prohibit the respondent from gaining access to legal representation during the inquiry proceeding;

(b) the facts and the surrounding circumstances dictate, at first blush, that it would be unfair to TTS if the respondent was given the adjournment in order to seek legal representation

because TTS was unrepresented by counsel and she was all alone to claim for her termination benefits; yet, the respondent was legally entitled to obtain the services of a lawyer; and

(c) the Employment Act 1955 does not restrict the respondent's common law right to legal representation.

**[56]** The appellant argued that an expeditious despatch of the inquiry by the labour officer would be "in consonance with the principle that differences and disputes" ought "to be determined and disposed of as expeditiously as possible" (to borrow the words of Abdoolcader SCJ in *Dunlop Industries Employees Union v. Dunlop (M) Industries Bhd* [1987] 1 CLJ 232; [1987] CLJ (Rep) 86; [1987] 2 MLJ 81, at p. 84). Indeed it is said that the objective of the inquiry is meant to be "simple, cheap and fast" bearing in mind that it involves workers earning less than RM1,500 per month. But that does not mean that the respondent could not be represented by legal counsel. It must be recalled that on 28 August 2002 the respondent was summoned to attend the labour office to answer the complaint lodged by TTS. It was fixed for hearing but it would not be unreasonable for the labour officer to enquire whether the parties have reached an amicable settlement. And when the parties could not settle the dispute the matter was adjourned to another date to be fixed by the labour officer.

**[57]** It would be ideal to refer, once again, to the case of *Soonfroze Corporation Sdn Bhd v. Siti Salabiah Chek Hassan & 19 Ors (supra)* especially to the headnotes at pp. 427 to 428:

> 1. It is in the absolute discretion of the court or tribunal to decide whether to grant an application for the postponement of a case already set down for hearing. All cases fixed for hearing should proceed with all convenient speed and without having to be adjourned on flimsy reasons. However, if there is an application for adjournment, the court must look at the material facts and grounds of the application in order to exercise its discretion correctly. A refusal to grant an adjournment can constitute a failure to give a party the opportunity of adequately presenting his case. Discretion must be exercised based on sound principles so as not to cause a miscarriage of justice.

**[58]** Now, for fear of repetition, in the present appeal the basis for the alleged application for an adjournment was to enable the respondent to have legal representation during the inquiry. However, according to the appellant, since legal representation is not a right under s. 70 of the Employment Act 1955, then the appellant is not legally bound to adjourn the inquiry to enable the respondent to have access to counsel during the inquiry. And unlike the case of S*oonfroze Corporation Sdn Bhd v. Siti Salabiah Chek Hassan & 19 Ors (supra)*, the present appeal was not heard and concluded on an *ex parte* basis. Liew Ah Fatt - the assistant human resources manager represented the respondent as compared to TTS who was present in person. Between Liew Ah Fatt and TTS, the former was more knowledgeable as compared to the latter. But that does not mean that the respondent could not be represented by legal counsel.

**[59]** Of crucial importance would be the question of whether the respondent has received procedural fairness in the decision making process that led to the decision which the respondent now sought to impugn. The same question was posed by Gopal Sri Ram JCA (later FCJ) in *Deputy Chief Police Officer, Perak & Anor v. Ramesh Thangaraju* [2001] 1 CLJ 245, CA. There at p. 250, his Lordship had this to say:

> I must now return to the case at hand and apply to it the principles now so well established by our courts. The primary question is whether the respondent received fairness, both procedurally and substantively.

**[60]** Continuing at p. 167, his Lordship Gopal Sri Ram JCA (later FCJ) after preferring to follow the decision of Wee Chong Jin CJ (Singapore) in *Abdul Raub v. The Attorney-General* [1982] 1 LNS 68, aptly said:

> In the present case, the respondent had the benefit of a full inquiry at which he was represented by an officer. The most material witnesses, namely the ACA officers who witnessed the incident in question gave their evidence in his presence. He was given the opportunity to cross-examine them. So far as Kamaruddin's statement was concerned, the reading of it into the proceedings did not produce any procedural unfairness since the respondent was given the opportunity to contradict it. It transpires from the evidence that he did not choose that course.

A I must now say a word about substantive fairness in this case. It is clear from the respondent's pleaded case and the arguments presented before the learned judge that the substantive merits of the decision were never challenged. It was not the respondent's case that the decision to dismiss him was unreasonable. His complaint
B was limited to procedural fairness. No material was therefore placed before the judge by way of evidence to show that the tribunal here had acted unreasonably in arriving at its decision.

**[61]** Likewise here, it was argued by the appellant that the parties before the inquiry had been given a fair hearing. From the notes of
C evidence, it can be discerned that both the parties have been given the right to be heard. Both the parties too have been given the opportunity to cross-examine the witnesses before the inquiry. Liew Ah Fatt was allowed to give his evidence before the inquiry. Everything seems to be done above-board. But that is not to be. It
D is our judgment that the labour officer breached the rules of natural justice or procedural fairness when he conducted the inquiry on 12 November 2002 by refusing to allow an adjournment for the benefit of the respondent to secure legal representation.

E **[62]** Abdoolcader J (later FCJ) speaking for the Federal Court in the case of *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150, spoke of the situation where one party was allowed to have legal representation but not the other, in these words (see p. 154 of the
F report):

> It is in our view clearly contrary to natural justice to allow one side to be legally represented but to refuse the same right to the other, as in this case.

G **[63]** Here, only Liew Ah Fatt sought an adjournment for legal representation to be given to the respondent. TTS, on the other hand, was not seeking for any legal representation. The appellant submitted that it would certainly be unfair to TTS if the respondent was accorded legal representation after an adjournment.
H That would certainly be in violation of the social justice which the Employment Act 1955 seeks to protect. The appellant emphasised that the inquiry before the labour officer does not involve any difficult question of law that requires the skill of a lawyer to assist the labour officer.

I

**[64]** It is common knowledge that not everyone is articulate enough to present his own case before an adjudicator. And not everyone can easily marshal the evidence in an orderly manner. And that there may be questions of law, like the present appeal at hand, which would prevent the aggrieved party from properly expounding the law. A nervous and an illiterate party - and there is no evidence that Liew Ah Fatt and TTS would fall in these categories, may not be able to advance his case in a proper light.

**[65]** But it is argued by the appellant that denial to legal representation is justified in that it saves expense and it protects the poor like TTS against the rich like the respondent and it also reduces delay and it prevents the mundane proceedings from becoming too formal and too technical. We say that the hallmarks of administrative adjudication are its speed, its cheapness and its fairness.

**[66]** In *Regina v. Board of Visitors of H.M. Prison, The Maze, Ex parte Hone, Regina v. Board of Visitors of H.M. Prison, The Maze, Ex parte McCartan* [1988] 1 AC 379, the House of Lords ruled that a prisoner could not claim legal representation in a disciplinary proceeding as of right even when the charge levelled against him constituted a crime in law. And the matter of permitting legal representation was said to be one of discretion with the Board of Visitors. Lord Goff aptly said at p. 392:

> Everything must depend on the circumstances of the particular case, as is amply demonstrated on the circumstances so carefully listed by Webster J in *Reg v. Secretary of State for the Home Department, Ex parte Tarrant* [1985] QB 251 as matters which boards of visitors should take into account.

**[67]** In *Selverajan v. Race Relations Board* [1976] 1 All ER 12, CA, legal representation before the Board was held to be unnecessary.

**[68]** In *Enderby Town Football Club Ltd v. The Football Association Ltd And Another* [1971] 1 All ER 215, CA, Lord Denning in deciding the question of legal representation ruled that whether a lawyer should appear or not before a tribunal was a matter for the discretion of the tribunal. His Lordship ruled that the aggrieved party has no absolute right to be legally represented. It must be borne in mind that in *Enderby*, legal representation was refused because there was a rule that say that legal representation would not be allowed.

**[69]** In *R v. Secretary of State for the Home Department And Others, ex parte Tarrant And Another, R v. Wormwood Scrubs Prison Board of Visitors, ex parte Anderson and others* [1984] 1 All ER 799, the Court of Appeal held that while the prisoner was not entitled to legal representation as a matter of right, the Board of Visitors has the discretion to permit legal representation.

**[70]** It is our judgment that the appellant had wrongly exercised its discretion in refusing to grant an adjournment to enable the respondent to obtain legal representation. And that such a refusal curtailed the respondent's common law right of legal representation.

**[71]** It is an accepted principle of law that the common law right of legal representation can be restricted either by express words stipulated in a statute or by way of necessary implication. Here, it is our judgment that s. 70 of the Employment Act 1955 does not restrict the right to counsel accorded to either party during the hearing of the inquiry.

**[72]** Liew Ah Fatt knew about the complaint of TTS. It was whether TTS was entitled to her termination benefits. It is our judgment that it was not a simple issue that can easily be managed by Liew Ah Fatt without the assistance of legal representation.

**[73]** We would also answer the second issue in the positive.

**The Third Issue**

**[74]** In regard to the computation of interest that was to commence on 14 October 2002, there is an affidavit which states that the date "14 October 2002" was a typing error and that the correct date would be the date when the decision was delivered and that would be on 15 November 2002.

**[75]** In *Armitage v. Parsons* [1908] 2 KB 410, the English Court of Appeal amended the judgment that was signed for a large amount and considered it as an error arising from an accidental slip. Sir Gorell Barnes, President had this to say at p. 417 of the report:

> The clerk whose duty it was to seal the judgment does not appear to have discovered the error, and so the judgment was signed for 12s. more than it ought to have been. To my mind it is clear, as a matter of good sense and justice, that this was an accidental slip

> which under Order XXVIII., r. 11, ought to be corrected, and that the whole judgment should not be set aside because of a mistake to the insignificant amount of 12s. I do not think that by so amending the judgment any of the rules or any principle of law is infringed. For these reasons I think that the appeal should be dismissed.

**[76]** From the affidavit, it appears that there has been an accidental slip in drawing up the order as reflected in "Borang C" which was produced earlier and that order as drawn up does not correctly state what the labour officer actually decided and intended (*Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92, FC; and *Behn Meyer & Co (M) Sdn Bhd v. Agropharm Sdn Bhd & Ors (Eskos Printing House Sdn Bhd & Ors, Garnishees)* [1986] 1 LNS 125).

**[77]** It must be emphasised that any party to an action is entitled to come to court and draw the attention of the court to the fact that a slip has been made in the order of the labour officer notwithstanding the fact that putting right of the slip does not benefit and may even injure the party making the application (*Re An Application By Marly Laboratory, Ltd* [1952] 1 All ER 1057, CA, [1952] WN 195, CA).

**[78]** But the "slip rule" cannot be used to correct what is not a clerical mistake or an accidental slip or omission. Order 20 r. 11 of the Rules of the High Court 1980 ("RHC") states as follows:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

**[79]** Here, there was no application by the appellant by way of a summons to correct the order of the labour officer dated 15 November 2002 under O. 20 r. 11 of the RHC. The labour officer's order dated 15 November 2002 directed the respondent to pay interest retrospectively with effect from 14 October 2002, which was a month before the date of the decision. In our judgment that order runs counter to s. 69(3A) of the Employment Act 1955 which enacts as follows:

> (3A) An order made by the Director General for the payment of money under this section shall carry interest at the rate of eight per centum per annum, or at such other rate not exceeding eight per centum per annum as the Director General may

direct, the interest to be calculated commencing on the thirty-first day from the date of the making of the order until the day the order is satisfied:

> Provided that the Director General, on an application by an employer made within thirty days from the date of the making of the order, if he is satisfied that special circumstances exist, may determine any other date from which the interest is to be calculated.

**[80]** It must be borne in mind that s. 69(3A) of the Employment Act 1955 is a creature of statute (*Austral Amalgamated Tin Bhd v. Abdul Wahab Kopon & Ors & Anor Appeal (supra)*) and it does not confer an inherent jurisdiction on the labour officer to impose interest retrospectively. In our judgment, it is a nullity to impose interest retrospectively. We would also answer the third issue in the positive.

**[81]** For the reasons adumbrated above, we dismissed the appeal by the appellant. We affirmed the decision of the High Court.